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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

NICOLE MAYS,

Defendant.

No. CR 07-0295 EDL

**UNITED STATES' SENTENCING
MEMORANDUM**

Hearing: August 6, 2008
Time: 11:00 a.m.
Courtroom: Courtroom A, 15th Floor
Hon. Elizabeth D. Laporte

I. INTRODUCTION

On April 23, 2008, defendant Nicole Mays ("Mays" or "Defendant") pled guilty to Count Two of the Information charging her with Possession of a Controlled Substance, to wit: marijuana, in violation of 21 U.S.C. § 844(a). This court has set August 6, 2008, at 11:00 a.m., as the date for judgment and sentencing. The Government submits the following sentencing memorandum to advise the Court of the Government's sentencing recommendation.

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II. DISCUSSION

A. Offense Conduct

The offense conduct is accurately described in the presentence report (hereinafter “PSR”) at ¶¶ 4-5. On March 18, 2007, Sergeant Thomas Hart (hereinafter “Sergeant Hart”), of the United States Park Police, observed a vehicle parked near Crissy Field within the Golden Gate National Recreation Area in San Francisco, California. PSR ¶ 5. Sergeant Hart, upon approaching the vehicle, observed two metal spoons, one with a thick dark substance affixed to the bottom, a lighter, a small clear plastic “bottle cap” filled with water, and a small clear plastic bindle of heroin. *Id.* When Sergeant Hart asked the three subjects who owned the heroin, the defendant replied, “It’s mine.” *Id.* The defendant was taken into custody because she had two active arrest warrants out of San Francisco, California, for failure to appear. *Id.* A subsequent search of the defendant’s purse revealed a clear plastic baggie containing marijuana. *Id.* A search of the vehicle revealed a clear plastic bag filled with twenty functioning plastic syringes on the front passenger floorboard. *Id.* A laboratory report completed by the United States Department of Justice, Drug Enforcement Administration, revealed drug amounts of 0.83 net grams of heroin and 2.3 net grams of marijuana. *Id.*

B. Objections/Corrections to the PSR

The Government has no objections to the contents of the PSR.

D. Sentencing Guidelines Calculations

The Government concurs with the probation officer’s calculation of the sentencing guidelines. PSR ¶¶ 11–21; 25. The adjusted Base Offense Level is eight because Defendant should be held accountable for both the Heroin and the Marijuana found in the vehicle for which she admitted possession. U.S.S.G. § 1B1.3. This issue is contested by defense counsel and the United States addresses defendant’s objections below in Section G, Government’s Response to Defendant’s Objections. Mays’ criminal history category is I. PSR ¶ 25. Mays falls within Zone A of the sentencing table, which allows for a sentence of probation.

E. Government’s Notes on Prejudgment Probation Pursuant to 18 U.S.C. § 3607

The Government notes the following with respect to the prejudgment probation statute, 18

1 U.S.C. § 3607: (1) Prejudgment probation under 18 U.S.C. § 3607 is discretionary and need not
 2 be applied; and (2) In the event this Court imposes prejudgment probation on the defendant, this
 3 Court has the authority to impose conditions of prejudgment probation as it sees fit.

4 1. 18 U.S.C. § 3607 provides that the court “may” place a defendant on prejudgment
 5 probation, not that it “must.” In *United States v. Gonzalez*, the 9th Circuit upheld a district court
 6 decision applying a preponderance of the evidence standard to deny a request for special
 7 probation under 18 U.S.C. § 3607. *United States v. Gonzalez*, 365 F.3d 796 (9th Cir. 2004). The
 8 district court in *Gonzalez*, after the jury convicted the defendant for simple possession but did
 9 not convict on a count of intent to sell, held:

10 Discretionary probation is for the exceptional circumstance, when a person – a
 11 first-time offender – has presented himself to the criminal justice system. The
 12 defendant is not that person. And in any event, his conduct here was far more than
 mere simple-possession-for-personal-use purpose.

13 *Id.* at 797. As such, if this Court sees fit, it is appropriate to consider all of Mays’ actions on
 14 March 18, 2007, by a preponderance of the evidence standard to determine whether to order
 15 prejudgment probation.

16 2. The legislative history of 18 U.S.C. § 3607 states that “the period of probation may not
 17 exceed 1 year and shall be subject to such conditions as the court may proscribe.” H.R. Rep. No.
 18 91–1444, at 4577 (1970).¹ As such, Congress intended this Court have broad and wide-reaching
 19 power to attach conditions to prejudgment probation as the Court sees fit.

20 **F. Government’s Sentencing Recommendation**

21 The Government concurs with the Probation Officer’s recommendation that Mays be placed
 22 on probation for a term of twelve months, with the entry of judgment deferred pursuant to 18
 23 U.S.C. § 3607. If Mays completes the term of probation without violation of the conditions
 24 imposed, the conviction will then be dismissed.

25
 26 ¹ This legislative history specifically pertains to 21 U.S.C. § 844(b), which originally
 27 contained the same provisions as 18 U.S.C. § 3607. That law was amended by the
 28 Comprehensive Crime Control Act of 1984 to, in part, recodify relevant provisions of 21 U.S.C.
 § 844(b) to 18 U.S.C. § 3607, along with other provisions relating to probation and postsentence
 administration generally. The policies and force behind the legislative history remain the same.

1 Mays is a candidate for prejudgment probation under 18 U.S.C. § 3607. Mays pled guilty to
2 a violation of 21 U.S.C. § 844(a), does not have a prior federal or state law violation relating to
3 controlled substances, and has not previously been the subject of a disposition under 18 U.S.C. §
4 3607.

5 There are standard conditions imposed on a prejudgment probation conviction, which the
6 government urges the court to adopt. *See* attached Exhibit A - (U.S. Courts Form AO 246, Order
7 of Probation Pursuant to 18 U.S.C. § 3607). They include that the defendant:

- 8 1. Shall not commit another federal, state or local crime.
- 9 2. Shall not leave the judicial district without the permission of the court or probation
10 officer;
- 11 3. Shall report to the probation officer as directed by the court and shall submit a truthful
12 and complete written report within the first five days of each month;
- 13 4. Shall answer truthfully all inquiries by the probation officer and follow the instructions of
14 the probation officer;
- 15 5. Shall support his or her dependents and meet other family responsibilities;
- 16 6. Shall work regularly at a lawful occupation unless excused by the probation officer for
17 schooling, training, or other acceptable reasons;
- 18 7. Shall notify the probation officer within seventy-two hours of any change in residence or
19 employment;
- 20 8. Shall refrain from excessive use of alcohol and shall not purchase, possess, use,
21 distribute, or administer any narcotic or other controlled substance, or any paraphernalia
22 related to such substances, except as prescribed by a physician;
- 23 9. Shall not frequent places where controlled substances are illegally sold, used, distributed,
24 or administered;
- 25 10. Shall not associate with any persons engaged in criminal activity, and shall not associate
26 with any person convicted of a felony unless granted permission to do so by the
27 probation officer;
- 28 11. Shall permit a probation officer to visit him or her at any time at home or elsewhere and

1 shall permit confiscation of any contraband observed in plain view by the probation
2 officer;

3 12. Shall notify the probation officer within seventy-two hours of being arrested or
4 questioned by a law enforcement officer;

5 13. Shall not enter into any agreement to act as an informer or a special agent of a law
6 enforcement agency without permission of the court;

7 14. As directed by the probation officer, shall notify third parties of risks that may be
8 occasioned by defendant's criminal record or personal history or characteristics, and shall
9 permit the probation officer to make such notifications and to confirm the defendant's
10 compliance with such notification requirement.

11 15. Shall not possess a firearm or destructive device.

12 The United States agrees with the PSR that the Court should also adopt the following
13 additional conditions of probation:

14 1. The defendant shall pay any special assessment that is imposed by this judgment and that
15 remains unpaid at the commencement of the term of probation;

16 2. The defendant shall participate in a program of testing and treatment for drug abuse, as
17 directed by the probation officer, until such time as the defendant is released from treatment by
18 the probation officer. The defendant is to pay part or all of the cost of this treatment, at an
19 amount not to exceed the cost of treatment, as deemed appropriate by the probation officer.
20 Payments shall never exceed the total cost of urinalysis and counseling. The actual co-payment
21 schedule shall be determined by the probation officer;

22 3. The defendant shall submit her person, residence, office, vehicle, or any property under
23 her control to a search. Such a search shall be conducted by a United States Probation Officer at
24 a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or
25 evidence of a violation of a condition of release. Failure to submit to such a search may be
26 grounds for revocation; the defendant shall warn any residents that the premises may be subject
27 to searches.

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G. Government's Response to Defense Objections

Defendant has lodged her objections to the Base Offense Level sentencing guidelines calculations, arguing that Mays did not claim possession of the heroin found in the vehicle. It is the Government's position that the PSR's Base Offense Level Calculation is correct.² This is because the proper burden of proof to apply for factual findings used at sentencing is by a preponderance of evidence. *United States v. Garcia*, 522 F.3d 855, 860 (9th Cir. 2008). Using that standard, Mays possessed heroin on March 18, 2007. In the alternative, Mays aided, abetted, counseled, willfully caused, and/or jointly undertook criminal activity, to wit: possession of heroin, that, under U.S. Sentencing Guidelines Manual § 1B1.3(1)(A) and (B) (hereinafter "U.S.S.G."), constitutes Relevant Conduct. Because Mays' actions constitute Relevant Conduct under U.S.S.G. § 1B1.3(1)(A) and (B) and the defendant is to be held accountable at the sentencing stage for all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, it is proper to set the Base Offense Level at 8.

1. Mays possessed heroin on March 18, 2007.

Mays admitted to possessing heroin on March 18, 2007, in a statement to Sergeant Hart. In the alternative, if this confession is insufficient, Mays constructively possessed the heroin found in the car she was driving.

a. Mays claimed ownership of the heroin.

The PSR's sentencing guideline calculations are correct because Mays possessed heroin on March 18, 2007. As stated in The Offense Conduct, when Sergeant Hart asked the three subjects in the car who owned the heroin, Mays replied, "It's mine." PSR ¶ 5. Sergeant Hart's testimony to this effect was not discredited in the Order Denying Defendant's Motion to Suppress. (Order Den. Def's Mot. to Suppress at 4.) Furthermore, no other party in the car admitted to ownership of the heroin.

b. Mays constructively possessed the heroin.

² This issue is not moot if the court either does not order pre-judgment probation or Mays fails to comply with the Court ordered prejudgment probation and it is revoked.

1 In the event her confession is insufficient, Mays constructively possessed the drugs because
 2 she knew of the presence of heroin and had physical control of it – the standard from the 9th
 3 Circuit Model Jury Instructions. 9th Cir. Manual of Model Jury Instructions § 3.18 (2007) (“A
 4 person has possession of something if the person knows of its presence and has physical control
 5 of it, or knows of its presence and has the power and intention to control it”). The instructions
 6 further note that more than one person can be in possession of a controlled substance if “each
 7 knows of its presence and has the power and intention to control it.” *Id.* To find Defendant
 8 constructively possessed an item, the defendant must “know[] contraband is present and is
 9 capable of exercising dominion and control over the contraband.” *United States v. Behanna*, 814
 10 F.2d 1318, 1319 (9th Cir. 1987) (quoting *United States v. Rodriguez*, 761 F.2d 1339, 1341 (9th
 11 Cir. 1985)). Mere presence as a passenger in a car with contraband is insufficient to convict;
 12 there must be evidence “connecting him with the contraband, other than his presence in the
 13 vehicle.” *United States v. Sanchez-Mata*, 925 F.2d 1166, 1169 (9th Cir. 1991) (quoting *United*
 14 *States v. Ramos*, 476 F.2d 624, 625 (9th Cir. 1973)).

15 In addition to her statement, other evidence suggests that Mays was aware of the presence of
 16 heroin in her car. Jenny Benzon (hereinafter “Benzon”) testified that there was a “bottle cap
 17 filled with water in the car for the purpose of using the drugs that were in the car, which might
 18 have been on the middle console.” (Order Den. Def’s Mot. to Suppress at 4.) This corroborates
 19 Sergeant Hart’s testimony that he observed indicia of heroin usage in plain view in the car. *Id.* at
 20 3. It is reasonable to infer that Mays has knowledge of the indicia of heroin use because of her
 21 prior usage; the items would be unmistakable to her. PSR ¶ 39. Put together, it would have been
 22 difficult to impossible for Mays not to notice the heroin in the car.

23 Mays was also capable of exercising dominion and control over the contraband. In
 24 *Sanchez-Mata*, the Government failed to meet its burden to prove dominion and control when
 25 they could not show that the defendant, in part, did not drive “the car, [and] did not own the car.”
 26 *United States v. Sanchez-Mata*, 925 F.2d 1166, 1169 (9th Cir. 1991). Mays was substantially
 27 more than a passenger – she drove the car and thereby provided the location in which to store
 28 and use the heroin. Similarly, in *United States v. Penagos*, the 9th Circuit implicitly held that it

1 is possible that dominion or control can be inferred where the defendant personally transported
 2 the drug and/or owned the automobile in which the drugs were found. *United States. v. Penagos*,
 3 823 F.2d 346, 351 (9th Cir. 1987). That the heroin was in a car under her control underscores
 4 her ability to exercise dominion over the heroin. Even if she did not own it, she exercised
 5 control over the car to a degree close to that of a true owner. According to her own version of
 6 the events, when she stated “It’s mine,” she was referring to ownership of the car. (Order Den.
 7 Def’s Mot. to Suppress 4.) Additionally, unlike the defendant in *Penagos*, Mays was the driver
 8 of the car containing the drugs, not a mere passenger or hired gun who was there only to protect
 9 possibly undisclosed contents. *Penagos*, 823 F.2d at 351.

10 Moreover, evidence in the record suggests that Mays’ did possess the heroin. Mays admits
 11 to problems with heroin in the past for which she has sought help and claims she has been sober
 12 since 2001. PSR ¶ 39. Mays’ statements to the Probation Officer that she has not consumed
 13 drugs since 2001 is negated by (1) the marijuana found in her purse; (2) the heroin in a state of
 14 use located in the car; *and* (3) her association with drug users. *Id.* at 39. Possessing marijuana
 15 and associating with heroin users is not consistent with someone on the road to recovery. While
 16 circumstantial, her credibility and position in the car help to corroborate the above arguments
 17 that she did indeed constructively possess heroin. These facts point to a conclusion that Mays
 18 was more than just simply present in the endeavor.

19 **2. In the alternative, Mays aided, abetted, counseled, willfully caused, and/or jointly**
 20 **undertook criminal activity, to wit: possession of heroin, with the other members in**
 21 **the car.**

22 In the alternative, should the Court determine Mays did not possess heroin, Mays aided,
 23 abetted, counseled, willfully caused, and/or jointly undertook criminal activity, to wit:
 24 possession of heroin, with the other members in the car. *See* U.S.S.G. § 1B1.3. Here, there is
 25 direct evidence that the defendant was aware of the heroin in the car. If, in the alternative, she
 26 did not know she was transporting drugs until they arrived at Chrissy Field, she failed to remove
 27 the heroin from the car after she became aware of its presence. Instead, she assisted, aided, and
 28 abetted the criminal behavior by housing the heroin and heroin usage in the car under her
 control. Any claim to the contrary is incredulous given the location of the drugs and the

aforementioned evidence. Rather, according to the testimony of Sergeant Hart, he saw in plain view items that his training taught him are consistent with use of controlled substances such as heroin. (Order Den. Def’s Mot. to Suppress at 3.) It is reasonable to infer that Mays has knowledge of the indicia of heroin use because of her prior usage; she cannot claim ignorance of the items in plain view in the car. PSR, ¶ 39. Sergeant Hart found two metal spoons, one with a thick, dark substance affixed to the bottom, the lighter and small clear plastic “bottle cap” filled with water, and a small clear plastic bindle of heroin – several of these items in plain view. PSR, ¶ 5. Mays was aware of the heroin usage and drug possession taking place in the car, even if the drugs were not hers and even if she was not personally using the heroin. She aided the drug possession and/or usage by driving her passengers to what they likely presumed was a location safe from police and by transporting the heroin. This behavior falls under U.S.S.G. § 1B1.3(1)(A) and (B), Relevant Conduct, and thereby was properly included into the Base Offense Level.

The above facts establish, by a preponderance of the evidence, that Mays either possessed the heroin herself or aided, abetted, counseled, willfully caused, and/or jointly undertook criminal activity, to wit: possession of heroin, with the other members in the car. The PSR's calculations of the Base Offense Level are therefore correct.

III. CONCLUSION

The Government concurs with the Probation Officer's recommendation and respectfully recommends that Mays be placed on probation for a term of twelve months, with the entry of judgment deferred pursuant to 18 U.S.C. § 3607. If Mays completes the term of probation without violation of the conditions imposed, the conviction will then be dismissed.

DATED: 7/30/08

Respectfully submitted,

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/s/

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